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Jerry Dugger, dba J and D Enterprises v. Paul J. Cox, Cox Corporation, a Utah Corporation, Salt Lake County treasurer, Joseph A. Mollerup, McGhie Land Title Company, a Utah Corporation, Clive M Maxwell dba C. M. Maxwell Electric Company, and Herb Towers Murray Plumbing Company, a Utah Corporation : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14395-A
IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY DUGGER, dba J & D
ENTERPRISES,

Respondent - Plaintiff,

vs.

PAUL J. COX, COX CORPORATION,
a Utah corporation, SALT LAKE
COUNTY TREASURER, JOSEPH A.
MOLLERUP, McGHIE LAND TITLE
COMPANY, a Utah corporation,
CLIVE M. MAXWELL dba C. M.
MAXWELL ELECTRIC COMPANY, and
HERB TOWERS MURRAY PLUMBING
COMPANY, a Utah corporation,

Appellants - Defendants.

Case No. 14395

BRIEF OF APPELLANTS

NATURE OF THE CASE

This case involved a lien foreclosure action against real property and a claim for wages by the defendant Dugger, dba J & D Enterprises (hereinafter called "Dugger"), against Cox Corporation, the owner of the property, and Paul J. Cox as an individual (hereinafter called "Cox"). The subject

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property being located at 1342 South State Street, in the City and County of Salt Lake, State of Utah.

Other defendants claiming liens against said property were also named in said action, as follows:

1. Clive Maxwell, for and in behalf of C. M. Maxwell Electric Company (hereinafter called "Maxwell"), in the amount of \$2,342.00.
2. Herb Towers Murray Plumbing (hereinafter called "Towers"), in the amount of \$3,172.33.

Plaintiff Dugger's lien claim was for \$33,407.93, said sum including both of the foregoing liens.

Service Station Supply (hereinafter called "Station") filed a separate action bearing Civil No. 215255 in the same Court, which was consolidated with this action, but no lien was filed. Service Station Supply's claim of \$678.98 was, however, included in plaintiff Dugger's total lien claim of \$33,407.93.

Defendant Mollerup, the first mortgage holder, as well as defendants Salt Lake County Treasurer and McGhie Land Title Company were all allowed to withdraw from this case after all parties stipulated that their claims were prior to the claims of all of the remaining parties.

Cox filed a Counterclaim in this action against Dugger for physical damages caused to the subject property for \$50,000.00, plus punitive damages in the amount of \$150,000.00.

DISPOSITION OF CASE IN LOWER COURT

The lower court entered a "personal judgment" against Cox and in favor of Dugger, and defendants Towers, Maxwell and Station. The court failed to rule on Cox's Counterclaim.

In addition to the "personal judgment" the lower court further granted Dugger, Towers and Maxwell a lien against the subject property and ordered the lien foreclosed and the subject property sold at Sheriff's Sale.

The lower court refused Dugger's claim for wages.

RELIEF SOUGHT ON APPEAL

On appeal Cox seeks reversal of the lower court's "personal judgment" against Cox and an order declaring the lien against the subject property void and restoring said subject property to Cox.

In the alternative, Cox seeks to have the judgment amount reduced so as to conform to the evidence submitted

at trial and to have the Counterclaim remanded to the lower court for a new trial.

STATEMENT OF FACTS

The subject property was at all times herein mentioned leased by Cox to Dynatek Corp. (hereinafter called "Dynatek"), pursuant to a written lease. Commencing in December, 1971, and continuing on through the 19th day of July, 1972, during all of which time said subject property was leased to Dynatek, Dugger claims that he was the agent of Cox and had authority to act for Cox with regard to the subject property. Dugger claims that pursuant to said authority he performed certain services and arranged for third parties to furnish material and services, and in general organized and managed the repair work being conducted during the aforesaid period at the subject property. Dugger claims compensation for said services as an employee or agent for wages earned during said period of \$1,000.00 per month plus expenses. In addition thereto, Dugger claims that he should be reimbursed for any charges incurred by him which relate to the subject property during said period of time wherein any company, person, partnership, corporation or other entity furnished materials or

labor at the request of Dugger for the subject property. Dugger does not claim any written contract with Cox, but claims the arrangement was oral.

Dugger further claims that Cox failed and refused to compensate him in the amount of \$1,000.00 per month as provided for by the alleged oral agreement and that Cox failed and refused to reimburse him for his expenses incurred with regard to the subject property and that the said Cox failed and refused to reimburse said Dugger for the bills and/or charges incurred by said Dugger in the favor of various third parties, including the other defendants herein, with regard to furnishing services, materials and miscellaneous supplies to the subject property and as a result of said failures Dugger did, on or about the 19th day of July, 1972, cause to be filed against the subject property a mechanics lien in the amount of \$33,407.93, claiming that said amount included all other creditors' claims for services, labor, materials and/or supplies furnished for the benefit of the subject property. Dugger claims wages for six months totalling \$6,000.00, which he claimed at trial were included as part of the lien.

In addition to the lien claimed by Dugger, additional liens were filed against the subject property by

Maxwell for \$3,042.00, the same being filed on or about the 10th day of May, 1972, and Towers for \$3,172.00, said lien being filed on or about the 30th day of June, 1972; both of said liens, however, were included in Duggers total lien.

In addition to the aforesaid claims against the subject property, Station was allowed to join the case and make a claim for judgment against Cox in the amount of \$678.98. Station, however, did not file a lien against the subject property and Dugger did not file a lien in behalf of Station.

In addition to the foregoing Dugger claims that the subject property was substantially improved by his efforts and that to allow Cox to take advantage of said improvements without paying therefor would unjustly enrich Cox.

Cox denies any agency agreement with Dugger, and therefore claims that Dugger has no authority whatsoever to obligate the subject property for Cox, thus making the lien filed by Dugger invalid.

Cox further claims that the lien is invalid for the further reason that it incorrectly described the subject property, that it co-mingled items which cannot

be a subject of a lien with the lien figure, and that the amount of the lien was in excess of the actual debts claimed to be due and owing against said property as shown by Dugger's proof at trial.

Cox claimed damages against Dugger for filing a lien against its property thus encumbering the subject property and resulting in the curtailment of Cox's borrowing power so that it could not continue with its program of development for properties located at 2500 South State Street and properties located at Beck Street, both said properties being owned by Cox. Cox further claims physical damages to property against Dugger. The total damages claimed by Cox is \$51,750.00.

ARGUMENT

POINT I

THE EVIDENCE WILL NOT SUPPORT THE LOWER COURT'S FINDING THAT DUGGER WAS AGENT FOR COX AND SAID COURT ERRED IN SO FINDING.

Agency.

"Agency is ordinarily a relation created by agreement of the parties, and as between the principal and agent, an agency is created and authority is actually conferred very much as a contract is made, to the extent that the creation results from the agreement between the

principal and agent that such a relation shall exist. As between the parties to the relation, there must be a meeting of the minds in establishing the agency, and the consent of both the principal and the agent is necessary to create the agency, . . . the principal must intend that the agent shall act for him, . . . and the intention of the parties must find expression either in words or conduct between them." (Emphasis added)
(3 AmJur 2nd, Sec. 17, P.428)

" . . . and whether an agency has in fact been created is to be determined by the relations of the parties as they exist under their agreement or acts, with the question being ultimately one of intention. The question is to be determined by the fact that one represents and is acting for another, and not by the consideration that it will be inconvenient or unjust if he is not held to be the agent of such other . . ."
(Emphasis added) (3 AmJur 2nd, Sec. 21, P 430-31)

In the instant case Dugger testified that he was neither the agent of Cox nor an employee. (See P. 215, lines 7 thru 11 of transcript)

Don Hall testified that Dugger and witness Curtiss Johnson, the President of Dynatek, the lessee of the subject property, had offices in the building located on the subject property (P.291, lines 7-30), and that Dugger's and Johnson's desks were side-by-side and that Dugger asked Hall to do the work on the subject property for Dugger and Dynatek, not Dugger and Cox. That Hall would not do the work for Cox because of advice from his employer, and Johnson, not Cox, paid for Hall's work. (See Hall's testimony, P.288, lines 3-6)

Consider further the testimony of other witnesses who were creditors of Dugger and/or Dynatek that were called by Dugger to testify for and in his behalf to the effect that none of the said witnesses ever dealt with Cox, nor did they expect him to pay the bill. (See P.27, lines 27-30, P.28, lines 1-30, P.29, lines 16-22) That some of the creditors did not even know Cox nor did they at the time the debt was incurred expect Cox to pay the respective debts due them, but said creditors testified that they expected Dynatek and/or Dugger to pay to the debts incurred, and that Dugger was working for Dynatek. (See P.35, lines 27-30, P.36, lines 3-6) The creditors further testified that Dugger never once told them who owned said property, nor did Dugger ever charge anything which was delivered to said property in the name of Cox. Dugger did, however, on numerous occasions charge items in the name of Dynatek, the owner of the leasehold interest and Dugger also charged items in the name of J & D Enterprises and Jerry Dugger personally. (See P.66, lines 8-11, P.72, lines 6-10, P.80, lines 17-30, P.81, lines 1-3, P.82, lines 19-23, P.83, lines 5-14, P.96, lines 14-25, P.107, lines 9-17, P.112, lines 4-30, P.113, lines 1-8, P.115, lines 2-24, P.118, line 19-23, P.125, lines 4-30, and P.126, line 1.)

Dugger produced no evidence to show that any of the creditors relied upon the testimony regarding agency as related by Turner and Johnson, both interested parties, or that the creditors ever had knowledge of said conversations and neither Johnson nor Turner were creditors. No evidence was introduced by Dugger that any of the creditors relied on the testimony of Woolas A. Macey regarding the relationship between Dugger and Cox, which Cox denied.

It would seem logical that if Dugger was in fact Cox's agent that he would have at least once during all of these transactions charged something in the name of Cox, but he cannot offer one instance in which this happened. Neither did Dugger offer any evidence to show that the alleged agency agreement was to be that of an undisclosed principal or employer nature.

I would further point out that none of these creditors ever dealt with Cox previously by and through Dugger. Neither had the majority of said creditors ever dealt directly with Cox. Therefore, it can hardly be said that Cox had clothed Dugger with ostensible authority to act for Cox Corporation or Paul J. Cox by reason of past actions, thereby creating an agency relationship.

A check introduced into evidence by defendant Cox

from a finance company in the amount of \$10,000 further indicates that Dugger was in fact Johnson's agent, and they were working together to purchase the first mortgage on the subject property from one Mollerup, and in fact Dugger and Johnson were ultimately successful in bringing about a purchase of the first mortgage from Mollerup by one Beesley, and immediately after the same was purchased by Beesley the same was assigned to Zions First National Bank and a foreclosure action was commenced to foreclose Cox's interest out of the property. The court can take judicial notice of said action being filed as Civil No. 215226 in the above entitled district court.

Cox testified that he did in fact authorize certain acts to be done by Dugger, to-wit: moving an old house, which was not located on the subject property but on a lot just north of said subject property, purchase doors for the car wash, and some carpenter work. Cox testified that he did in fact pay Dugger for all of said work performed. The evidence further shows that these three items are the only items which Dugger ever billed Cox for, thus negating the attempted inference by Dugger that he had authority to do other acts for Cox. Dugger failed to produce one shred of written evidence to indicate that from January 1, 1972,

through July 7, 1972, that he had made any demand for payment upon Cox, except for the items just mentioned above. Neither did Dugger, prior to said time, ever furnish Cox with an accounting of the bills against said property and, in fact, no completed accounting was produced at trial, and then Dugger could not testify as to what was owed him. (See P.194, lines 11-17)

POINT II

THE LOWER COURT ERRED WHEN IT GRANTED "A PERSONAL JUDGMENT" AGAINST COX AND IN FAVOR OF PLAINTIFF ON THE THEORY OF UNJUST ENRICHMENT.

Acting officiously also applies to the claim made by Dugger that Cox was unjustly enriched by reason of the acts of Dugger and the other Plaintiff creditors. In 66 Am. Jur. 2nd, Sec. 5, p. 948, entitled "Restitution and Implied Contracts", wherein the subject of officious acts are discussed, the following is stated:

"A basic principal underlying the rules in regard to restitution ('unjust enrichment') is that a person who officiously confers a benefit upon another is not entitled to restitution therefor. Officiousness means interference in the affairs of others not justified by the circumstances under which the interference takes place. Policy ordinarily requires that a person who has conferred a benefit either by way of giving another services, or by adding to the value of his land, or by paying his debt, or even by transferring property to him should not be permitted to require the other to pay therefor, unless the one conferring the benefit had a valid reason for so doing. Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The rule denying restitution to officious persons has the effect of penalizing those who thrust benefits upon others and protecting persons who have had benefits thrust upon them.

One has a right to decline to permit another to perform an act on his account. A party is not liable quasi ex contractu for benefits forced upon him. Where there was no request for what the Plaintiff did, the fact that drawn out negotiations were unsuccessful because the parties

In order for Dugger to collect under a theory of restitution or unjust enrichment for wages or services performed there must have been no agreement in the first instance and here according to Dugger's own testimony, he claims that there was an oral agreement to pay, thus he must be bound by that testimony and cannot claim a right of recover under a theory of restitution, but must rely upon his alleged agency relationship which did not exist. 66 Am. Jur. 2nd, Sec. 11, p. 952, states that:

" . . . the doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the money or the use value of the property to the person whom in good conscience it ought to belong."

In the instant case all creditors, including Dugger, claimed against Cox that there was a legal and binding contract. Neither does Dugger or any of the other creditors claim or plea that there was not an existing contract, thus under the law applying to unjust enrichment they cannot recover.

did not agree on a price affords no basis for imposing a quasi-contractual liability on the Defendant in such case, the Plaintiff occupies the position of a volunteer."

(Gould v American Water Works Service Co., 52 NJ 226, 245 A2d 14 (citing Restatement, Restitution, Secs. 2, 41, 112)). Mehl v Norton, 201 Minn 203, 275 NW 843, 113 ALR 1055). (Restatement, Restitution, Sec. 2 Comment a; Section 112, Comment a).

In 66 Am. Jur. 2nd, Sec. 23, entitled "Restitution and Implied Contracts", it states as follows:

"Ordinarily the law imposes liability to pay for services rendered by another only when the person for whose benefit they were rendered by requested their rendition. As a general rule, where a person performs labor for another without the latter's request, however beneficial such labor may be, he cannot recover therefor. There is no implied contract to pay for services not requested where the person sought to be charged made no use thereof." (Emphasis added) (See Tilley v Cook County, 103 US 155, 27 L Ed 374.)

"The basic principal that a person who officiously confers a benefit upon another is not entitled to restitution therefor, and the general rule that a person who without mistake, coercion, or request has unconditionally conferred a benefit upon another is not entitled to restitution . . ."

In the instant case there was no evidence offered by Dugger that any of the specific acts performed by him and testified to by him were requested to be done by Cox. In fact, the evidence indicated just the opposite, that Cox objected to the services being performed.

POINT III

THE LOWER COURT ERRED IN DECLARING DUGGER'S LIEN VALID BECAUSE THE SAME COVERED EXCESS PROPERTY NOT BENEFITED BY THE ALLEGED SERVICES AND MATERIALS FURNISHED BY DUGGER.

The lien filed by Dugger covered property in excess of the property which Dugger claims to have conferred a benefit upon by his alleged services and/or materials which he claims to have furnished. Dugger's Complaint, on its face, states that the lien covered property in excess of that which was intended, and said Complaint prays for permission to amend said lien. Said permission to amend said lien was never granted nor was said lien ever amended. Sec. 38-1-4, UCA (1953), Replacement Volume 4, states the following:

"The liens granted by this chapter shall extend to and cover so much of the land whereon such building structure or improvement shall be made as may be necessary for the continuing convenient use and occupation thereof." (Emphasis added)

Thus Dugger is legally bound by his Complaint and said Complaint having admitted that the lien covered excess property and Dugger having never corrected the same, the lien of Dugger is invalid.

POINT IV

THE COURT ERRED IN DETERMINING THAT THE LIENS OF OTHER CREDITORS WERE VALID BECAUSE SAID LIENS WERE NOT FILED PURSUANT TO LAW, AND THE ERRORS IN SAID LIENS FURTHER SUPPORT COX'S CONTENTION THAT NO AGENCY EXISTED BETWEEN COX AND DUGGER AS PER POINT I HEREOF.

Sec. 38-1-7, UCA (1953), Replacement Volume 4, sets forth the requirement and contents of the notice to be filed by the lien claimant and states the following:

" . . . every lien shall set forth . . . the name of the person by whom he was employed or to whom he furnished the material with a statement of the terms, time given and conditions of his contract, specifying the time when the first and last labor was performed or the first and last material was furnished, and also a description of the property to be charged with a lien sufficient for identification which claim must be verified by oath of himself or some other person." (Emphasis added)

In the instant case, the lien of Towers shows that he was contacted by Curtis C. Johnson of Dynatek Enterprises, Inc., the lessee of the property and under a verbal agreement for time and materials made between the said Curtis C. Johnson, Dynatek Enterprises, Inc., on the 9th day of May, 1972, through the 8th day of June, 1972, performed work and Johnson agreed to pay for the same. Said lien further shows that Johnson made payments by check drawn on bank accounts which contained insufficient funds. The lien of Towers is void by reason of the fact that there

was no evidence whatsoever put on by Dugger or Towers showing that there was any agency relationship between Curtis C. Johnson, Dynatek, and Cox, and in order to make Towers' lien valid, Plaintiffs must, according to Eccles Lumber Co. v Martin, 31 U 241, 87 P 713, have made a contract with the owner of the land or his authorized agent in order to successfully initiate a lien against the owner's real property. This lien being made and filed in July of 1972 right at the time that the acts testified by all parties was taking place clearly indicates that Dynatek Enterprises, Inc., and Curtis C. Johnson were operating as lessee out of the subject property, and Dugger was their agent. (See also Ellis v Brisacher, 8 U 108, 29 P 879, which states that if repairs and improvements are put on premises under contract between a contractor and a lessee of said premises, then and in that event any liens filed against said premises shall be against the interests of the leasehold only.) (See also Buehner Block Co. v Glezo, 6 U 2d 226, 310 P2d 517, which indicates that the lessee of real property is an owner within the meaning of the Mechanics Lien statute.)

The lien filed by Maxwell is void also for the reason as stated heretofore herein and as borne out by the facts

that Dugger was in fact not the agent for Cox Corporation, and said lien is further faulty by reason of the fact that the same shows that the contract was made with J & D Enterprises and Dynatek, and that the said J & D Enterprises and Dynatek agreed to pay the bill upon completion of the contract. Here again the said lien being made and filed in May of 1972 at the time the work was being done shows that J & D Enterprises was agent for Dynatek and not Cox. (Towers' lien is marked Exhibit 1D Towers; Maxwell's lien is marked Exhibit 7D Maxwell; and Dugger's lien is marked as Exhibit 22P).

POINT V

THE COURT ERRED IN AWARDING ATTORNEY FEES BECAUSE (1) THE LIENS ARE INVALID, AND (2) INSUFFICIENT EVIDENCE WAS PRODUCED TO SUPPORT JUDGMENT FOR ATTORNEY FEES

Section 38-1-18, Utah Code Annotated 1953, Replacement Volume 4, provides

"In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover reasonable attorney fees to be fixed by the court which shall be taxed as cost in the action."

All parties failed to put on sufficient evidence at trial to justify an award of attorney fees. Counsel merely asking their clients if a certain amount to be charged as and for attorney fees is reasonable, is not sufficient evidence for the court to determine the value of said fees without knowing the hours, etc. put into said case.

Thus, based upon the evidence before the lower court it erred in awarding attorney fees to Dugger and the other alleged creditors under the foregoing statute.

POINT VI

THE COURT ERRED IN DECLARING DUGGER'S LIEN VALID BECAUSE THE DOLLAR AMOUNT OF SAID LIEN WAS EXCESSIVE

Section 38-1-25 Utah Code Annotated 1953, Replacement Volume 4, provides

"Any person who knowingly causes to be filed for record a claim of lien against any property which contains a greater demand than the sum due him with the intent to cloud the title, or to exact from the owner or person liable by means of such excessive claim of lien more than is due him or procure any advantage or benefit whatever, is guilty of a misdemeanor."
(Emphasis added)

In the instant case the lien filed by Dugger is excessive as shown by the sums in Appendix A. hereto.

The excessive amount of Dugger's lien, along with the fact that Dugger without cause or justification liened other properties of the defendant Cox Corporation during the same period of time, and also made attempts to purchase or lease the subject property, certainly indicate that his interests were adverse to the interests of Cox, and the act of Dugger in liening the subject property for such an excessive amount was in fact an attempt to procure an advantage or benefit which, according to the statute, is prohibited.

In Hartford Acc. & Ind. Co. v. Orr (Okla) 321 P2d

373, the court held, in construing the statutes such as the ones that we have in Utah, that a lien claim is at most a tentative charge against property, and that it may be defeated by showing that the indebtedness, or a considerable part thereof is not owing. In the instant case Dugger in fact admitted that a considerable part of his lien which he claimed upon Cox's property was not due and owing by his failure to prove the same and by his failure to give proper credits to Cox Corporation as provided for by the lien statute, and by his further failure to deduct liens of others from his lien which were filed prior to Dugger's lien, and for his further audacity in including liens in lien without the authority of other creditors such as Don Hall, all of which make Dugger's lien invalid.

POINT VII

THE COURT ERRED IN DECLARING DUGGER'S LIEN VALID BECAUSE HE CO-MINGLED NONLIENABLE ITEMS THEREIN

51 AmJur 2nd, Section 7, P.149 states, "a lien is unenforceable if the notice or claim of lien mingles lienable and non-lienable items in unsegregated form", and 51 AmJur 2nd Sec. 15, P.154-155 states that a lien on property may not be declared as security for a simple money claim for services. (See also Jaycox v. Brune [Mo] 434 SW2d 539)

51 AmJur 2nd, Section 12, P.152-153 states that a "lien cannot be created by a mere volunteer and, as a general rule, no lien is created as against an owner of property in respect of expenditure upon or liabilities incurred in respect of that property by either a stranger or a part owner of the property." Here again, Dugger being a mere volunteer with regard to his acts upon the property in hopes of obtaining something in the future for himself cannot bind Cox.

Section 38-1-3 Utah Code Annotated 1953, Replacement Volume 4, states as follows regarding those who are entitled to a lien: "Contractors, subcontractors, and all persons performing the labor upon or furnishing

materials to be used in the construction or alteration of, or addition to, or repair of, any building, structure or improvement upon land . . ." are entitled to a lien. In the instant case Dugger did not in fact perform any labor or furnish any materials to be used in connection with said property but merely arranged to have the same furnished. The law is clear that a lien may not be declared as security for a simple money claim for services. (See 51 AmJur 2d, Sec. 15, P. 155, and Jaycox v. Brune [Mo] 434 SW2d 539) Thus Dugger admittedly claimed to have furnished services only and therefore he cannot lien the property, the courts making a distinction between labor upon the property and the mere act of furnishing services.

Many of the items included in Dugger's lien in addition to the wages claimed are not lienable items. Such other items which are not lienable items are travel expenses, cost of materials shipped to other areas and used on property such as Richfield and Nephi (See P.106, lines 1-30, and P.107, lines 1-30) and various other items such as supplies and inventory purchased for resale which were shipped to the service station and sold by Dynatek. All of the aforesaid items are documented by the evidence

submitted by Dugger and are detailed in Appendix B.
hereto.

POINT VIII

THE COURT ERRED WHEN IT FAILED AND NEGLECTED TO MAKE ANY RULING WITH REGARD TO THE COUNTERCLAIM OF COX.

Even though evidence was produced by Cox with regard to his Counterclaim, and even though the same was clearly outlined in a Brief to the Lower Court by counsel for Cox, the Court failed and neglected to make any ruling thereon, therefore, with regard to said Counterclaim, this case should be remanded in total to the District Court for further proceedings with regard to said Counterclaim's validity.

POINT IX

THE COURT ERRED IN AWARDING A PERSONAL JUDGMENT AND ALSO IN DECLARING THE LIEN VALID AND CAUSING THE SAME TO BE FORECLOSED

In substance and effect the lower court let Dugger and the other lien-claimants 'have their cake and eat it too' by awarding both a personal judgment and a judgment for a decree of foreclosure allowing the liens to be foreclosed. Said creditors either have to have a lien or not. If they have a lien that is valid they are entitled to attorney fees, and the statute provides for a method of foreclosure of same. If they do not have a valid lien then they are not entitled to attorney fees, but a judgment only. The lower court in granting both types of judgment allowed Dugger to encumber numerous other properties of Cox prior to foreclosure of his lien on the subject property, therefore giving him a decided advantage over Cox and any other creditors.

The lien foreclosure statute does not contemplate such an act by the lower court. Section 38-1-15 Utah Code Annotated 1953, Replacement Volume 4b, states as follows relating to mechanics liens:

"The court shall cause the property to be sold in satisfaction of the liens and costs

as in the case of foreclosure of mortgage subject to the right of redemption. . ."

Section 38-1-16 of said Code further provides for a deficiency after sale.

Section 78-37-1, Utah Code Annotated 1953, as amended, provides as follows:

"There can be but one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter."

Thus the lien statute refers to mortgage foreclosure statute and the mortgage foreclosure statute provides for one action, that being a foreclosure action and a determination of a deficiency or an overage, and the lower court failed to follow the law with regard to the same.

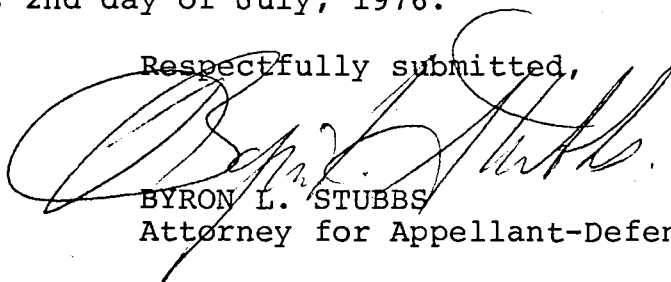
The purpose of such a provision is to compel one who claims a security for a debt to exhaust that particular security before resorting to the general assets of the debtor. Such a creditor cannot waive his security and sue on a debt. Thus, by reason of said error, this case in total should be remanded to the District Court for clarification and further proceedings in accordance with the law and the statutes as set forth herein.

CONCLUSION

For the reasons set forth herein, Cox respectfully requests and demands that the judgment of the lower court be reversed, that the liens on said property be declared void, and that this case be remanded in total to the District Court for further proceedings in accordance with the laws and statutes as set forth herein.

DATED this 2nd day of July, 1976.

Respectfully submitted,

A large, stylized handwritten signature in dark ink, likely belonging to Byron L. Stubbs, is written over the typed name.

BYRON L. STUBBS

Attorney for Appellant-Defendant Cox